FILE COPY

United States of America

IN THE

Supreme Court of the United States

No. 631

KENNETH M. KEEFE and WALLACE D. BRADFORD,
Petitioners and Appellants,
vs.
EARL L. CLARK, Drain Commissioner of Oakland County, Michigan, and
BOARD OF SUPERVISORS OF OAKLAND COUNTY,
Respondents and Appellees,
CITY OF ROYAL OAK,
Intervenor

BRIEF FOR APPELLEES ON MOTION TO DISMISS

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QUESTIONS INVOLVED IN MOTION TO DISMISS OR AFFIRM

I.

Was the constitutionality of Act 114 P. A. 1937 under Article I, Section 10 of the Federal Constitution, challenged in the Michigan Supreme Court to a sufficient extent to give the United States Supreme Court jurisdiction to pass on the constitutionality thereof?

Appellants say "Yes."
Appellees say "No."

II.

Did Act 155 of the Public Acts of Michigan for 1937 deprive Appellants of any rights in violation of Article I, Section 10 of the Federal Constitution?

Appellants say "Yes."
Appellees say "No."

III.

Should the motion to dismiss Appellants' appeal be granted?

Appellants say "No."
Appellees say "Yes."

IV.

Should the motion to affirm the decision of the Michigan Supreme Court be granted?

Appellants say "No."
Appellees say "Yes."

INDEX TO LEGAL CITATIONS

	Page
Federal Constitution:	
Article I, Section 10	6, 9
Michigan Statutes:	
Act 316 P. A. 1923	8, 10
Act 331 P. A. 1927	7, 8
Act 114 P. A. 1937	4, 5, 6, 8, 10, 11
Act 155 P. A. 1937	2, 4, 5, 9, 11
Act 129 P. A. 1939	8
Cases:	
Adams v. Preston, 22 How. 473; 16 L. Ed. 273	7
Baker v. State Land Office Board, 294 Mich. 587	8, 11
Honeyman v. Hanan, 57 S. Ct. 350; 300 U. S. 14; 81 L. Ed. 476	7
Keefe and Bradford v. Clark, 306 Mich. 503; 11 N. W. (2d) 220	6, 10
Levy v. San Francisco Superior Court, 170 U. S. 175	7
Michigan Central Railway Co. v. Michigan Southern Ry. Co., 19 How. 378; 15 L. Ed. 689	7
Millar v. Cornwall Railway Co., 168 U. S. 131	7
Municipal Investors v. City of Birmingham, 300 Mich. 501; 216 U. S. 152	9
Southwestern Bell Telephone Co. v. State of Oklahoma, 58 S. Ct. 528; 300 U. S. 206	7

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BRIEF FOR APPELLEES ON MOTION TO DISMISS

FACTS

(Applicable to Motion to Dismiss)

On June 25, 1942, Appellants filed in Oakland County Circuit Court, a petition for Declaration of Rights under section 13909 Michigan Compiled Laws for 1929.

The petition set up the fact that petitioners were the owners of 32 bonds issued by the East Clawson Storm

Sewer District, that they were due and unpaid, that they were entitled under the Michigan Drain law to a deficiency spread of assessment against all lands originally in the district including those sold by the State of Michigan under Act 155 of 1937 as amended.

Paragraph 5 of the Petition for Declaratory Judgment, which purports to raise a question under both the Federal and State constitutions reads as follows:

"5.

Petitioners are advised and believe that said questions must under the law of this State, interpreted to conform with various provisions of the Constitutions of the United States and the State of Michigan hereinafter set forth, be answered in the affirmative. Petitioners allege that Section 18, Ch. X, Act 316 Michigan Public Acts 1923, as amended by Act 331 Michigan Public Acts 1927 and Act 129 Michigan Public Acts 1939, provided for *additional deficiency assessments after the bonds of said drain district had all matured, to be levied in accordance with the percentages fixed in the original assessment rolls against every parcel of land in the drain district,* except those which at the time of the additional levy are exempt by reason of an actual ownership by the State of Michigan, United States of America, or municipal corporations, (and used by them for governmental purposes), and that nothing contained in Act 155 Michigan Public Acts of 1937, as amended, or any other statutes *in pari materia,* abrogated or curtailed such provision, or could as against petitioners or other holders of bonds of said district abrogate or curtail the same, and that any interpretation of same in the manner contended by respondents would violate Article 1, Section 10, and Amendment XIV, Section 1, of the Constitution of the United States, Article II, Sections 10 and 16, and Article X, Section 9, of the Constitution of the State of Michigan."

The Oakland Circuit Court denied petitioners the relief sought and appeal was taken to the Michigan Supreme Court.

Appellants filed briefs in the Michigan Supreme Court and set up the required "Statement of Questions Involved" as follows:

> "1. When lands in a drain district have passed through a scavenger sale under Act 155, Public Acts 1937, as amended, and are again privately owned, are they exempt from additional deficiency drain taxes provided under Act 129, Public Acts 1939?
>
> The lower court said 'Yes.'
> Appellants contend answer should be 'No.'
>
> 2. If Act 155, Public Acts 1937, as amended, can be construed as making such lands exempt from deficiency assessments, does it violate Article X, Section 9 of the State Constitution?
>
> The lower court impliedly said 'No.'
> Appellants contend answer should be 'Yes.'
>
> 3. If Act 155, Public Acts 1937, as amended, can be construed as making such lands exempt from deficiency assessments, does it violate Article I, Section 10, of the Federal Constitution, and Article II, Section 9, of the State Constitution?
>
> The court impliedly said 'No.'
> Appellants contend answer should be 'Yes.'
>
> 4. Do municipalities, against which an at large tax is spread, and lands which have not passed through a scavenger sale, become exempt from a deficiency levy under Act 129, Public Acts 1939?
>
> The court said 'Yes.'
> Appellants contend answer should be 'No.'"

Appellees accepted the issues as framed in the "Statement of Questions Involved" and filed brief pointed at those issues.

Appellants filed a reply brief and in an obvious, "casual" way referred to, "Acts 114 and 155 of 1937" but did not otherwise attack the constitutionality of Act 114 of 1937. The Michigan Supreme Court was not asked to, nor did it pass on, the question of Act 114 of 1937 impairing the obligation of contract provision of the Federal constitution, that question not being before them.

ARGUMENT AND LAW

Summary of Appellees' Position

A. The Act which removed the liens of Appellants was Act 114 of Public Acts of 1937, as amended.

B. Whether or not Act 114 of 1937, as amended, violated Article I, Section 10 of the Federal Constitution was not raised in the Michigan Supreme Court, was not passed on by that court and consequently this court is without jurisdiction.

C. No contract relation was created or violated by Act 155 of 1937 as amended between the parties hereto or any other parties, hence a challenge here to the constitutionality of Act 155 of 1937, as amended, must fail.

A.

"The Act which removed the liens of Appellants was Act 114 of 1937, as amended, by Act 282 of 1939 and Act 234 of 1941,"

the pertinent portion of which reads as follows:

> "Such final decree (Decree on tax sale) shall be entered in the chancery court record for recording of decrees of such court, have the usual caption for decrees and shall be substantially in the following form. * * * It is further ordered, adjudicated and decreed that title to each parcel of land ordered in this decree to be offered for sale, and which parcel of land is bid in at such sale to the State, shall become absolute in the State of Michigan on the expiration of the period of redemption from such sale and all taxes, special assessments which are charged against or are liens upon such parcels and other liens and encumbrances against such parcels

of whatever kind or nature shall be cancelled as of such date unless any said parcel of land should be redeemed as provided in section 74 of Act 206 of Public Acts of 1893, as amended, or unless an appeal shall have been taken as provided in said Act * * *"

If the constitutional rights of Appellants were violated by removal of the liens, which they claim (and which Appellees deny) then Act 114 of 1937, as amended, as above quoted was the Act which violated their constitutional rights, not Act 155 of 1937 as amended.

B.

"Whether or not Act 114 of 1937, as amended, violated Article I, Section 10 of the Federal Constitution was not raised in the Michigan Supreme Court, was not passed on by that court and consequently this court is without jurisdiction."

Reference to "Statement of Questions Involved" as framed by Appellants in their brief filed in the Michigan Supreme Court (page 3, *ante*) will disclose that the constitutionality of Act 114 of 1937, as amended, was not challenged in the Michigan Supreme Court.

Reference to the decision of the Michigan Supreme Court in the instant case, 306 Mich. 503, 11 N. W. Reporter, second series, 220, will disclose that the Michigan Supreme Court did not pass on the constitutionality of Act 114 as being violative of Article I, Section 10 of the United States Constitution and presumably they did not do so because the question was not presented to them.

It is too late at this time to present the question of the constitutionality of Act 114 of 1937 as amended, as this court has declared on many occasions:

"In order to give the Supreme Court jurisdiction of a writ of error to review a judgment which the highest court of a State has rendered in favor of the validity of a statute of or an authority exercised under a State, the validity of a statute or authority must have been drawn in question on the ground of their being repugnant to the Constitution, laws or treaties of the United States. When no such ground has been presented to or considered by the courts of the State the federal Supreme Court has no jurisdiction."

Michigan Central Ry. Co. v. Michigan Southern Ry. Co., 19 How. 378, 15 L. Ed. 689;

Adams v. Preston, 22 How. 473, 16 L. Ed. 273;

Levy v. San Francisco Superior Court, 167 U. S. 175;

Miller v. Cornwall Ry. Co., 168 U. S. 131.

"The United States Supreme Court may not undertake to review decisions of State courts, unless it appears affirmatively from the record not only that the federal question involved was presented for decision to the highest court for jurisdiction, but that its decision of the federal question was necessary to determination of the cause."

Honeyman v. Hanan, 57 S. Ct. 350, 300 U. S. 14, 81 L. Ed. 476;

Southwestern Bell Telephone Co. v. State of Oklahoma, 58 S. Ct. 528, 300 U. S. 206.

C.

No contract relation was created or violated by Act 155 of 1937 as amended, between the parties hereto or any other parties, hence a challenge here to the constitutionality of Act 155 of 1937, as amended, must fail.

The statutes in existence at the date the bonds were issued, namely, November 1, 1927, and which statutes Ap-

pellants claim are part of their bond contract, are known as Act 316 of the Public Acts of Michigan for 1923, as amended by Act 331 of the Public Acts of Michigan for 1927 and further amended by Act 129 of Michigan Public Acts for 1939, and the pertinent section thereof is found in Michigan Statutes Annotated, 11.104.

Assuming for the sake of argument that the Appellants had contractual rights under Section 18 above referred to, those rights, if impaired (which is denied) were impaired by Act 114 of Public Acts of 1937, as amended, the constitutionality of which was not challenged in the Michigan Supreme Court and cannot be challenged here.

The only remaining question then, is whether or not any contractual rights of Appellants were violated by the passage of Act 155 of 1937, as amended, the constitutionality of which is challenged.

Assuming as we must that Act 114 of 1937, as amended, is constitutional, and it has been so adjudicated in *Baker v. State Land Office Board,* 294 Mich. 587, page 598, the title to the various properties which were not redeemed by the parties in interest including Appellants as parties in interest, passed to the State of Michigan free of all liens and encumbrances. Act 155 of 1937, as amended, set up the machinery to dispose of the State owned lands which at best was a change in the remedy afforded to collect delinquent taxes. Owning the lands free and clear there was nothing to prevent the State from selling them free and clear and certainly the Appellants acquired no contractual rights by virtue of the provisions of Act 155, and Act 155 did not take away any rights Appellants had, the loss, if any, of the rights complained of having taken place under Act 114 of 1937, as amended.

Hence, we have before the court a situation where Appellants are challenging the constitutionality of an Act,

namely, Act 155 of 1937, as amended, as being violative of Article I, Section 10 of the United States Constitution which prohibits the impairment of obligation of contract when no contractual rights complained of were created or destroyed by the Act. Appellants have no standing in court under *Municipal Investors v. City of Birmingham*, 216 U. S., 152-3.

The only contractual right acquired by Appellants under Act 155 of 1937 was the following (M. S. A. 7.960, Section 10):

> "All moneys received by the state land office board, any county treasurer or the department of conservation, under the provisions of this act, and all moneys received after the expiration of this act of the department of conservation, pursuant to any sale by said state land office board on time payment plans, shall be credited to the general fund of the state, and, after first deducting such commissions and maintenance costs as are authorized in sections 4 and 8 of this act, shall be paid to the several county treasurers who shall remit the same to the several tax assessing units, including municipalities collecting their own delinquent taxes, in proportion to the delinquent taxes and special assessments of such units cancelled against any description of land sold under the provisions of this act, by the board, any county treasurer or the department of conservation; Provided, however, That at the close of each fiscal year the state land office board shall deduct from interest received on land contracts during that year an amount equivalent to the operating expenses of the board for that year, which amount shall be credited to the general fund of the state (and the remainder after deducting the expense of the county treasurer in making distribution under this section shall be prorated among the several tax assessing units aforesaid, in proportion to the delinquent taxes and

special assessments of such units cancelled, as aforesaid). It shall be the duty of any county treasurer to prepare a certificate of all cancelled taxes upon any such description of land upon request by the state land office board, the department of conservation or the auditor general, which certificate shall be in a form approved by the auditor general, and shall be the basis for distribution of moneys between the several tax assessing units. Such cancelled taxes and special assessments shall be deemed to include all taxes and assessments assessed or levied against said lands prior to the vesting of title in the state of Michigan."

and the East Clawson Storm Sewer Drain district fund has received its share of such proceeds.

CONCLUSION

Taking the best view of Appellant's case it sums up as follows:

1. Appellants had certain contractual rights by virtue of their ownership of bonds purchased in 1927. The then statutes were part of the contract, subject, of course, to "'the well known reservations of the essential attributes of the sovereign power and this reservation must also be read into contracts as a postulate of the legal order." (*Keefe v. Drain Commissioner*, 11 N. W. (2d), 220, page 223);

2. These rights consisted of, (1) a spread in case of deficiency, (2) a perpetual lien until the taxes were paid (Sec. 18, ch. 10, Act 316 of 1923).

3. Alarming tax delinquency ensued and Act 114 of 1937 was passed providing that failure to redeem at a fixed time from the ensuing tax sales vested the properties

in the State of Michigan, free and clear of all liens and encumbrances (*Baker v. State Land Office Board*, 294 Mich. 587).

4. In vain do you search the "Petition for Declaration of Rights" and Appellants' brief in the Michigan Supreme Court for specific mention or challenge to the constitutionality of Act 114 of 1937. The most you can find is mention of Act 155 of 1937 and "statutes construed *in pari materia*" or reference to the "general tax law." To attack the constitutionality of an act specific pleading is necessary. True, the reply brief attempts to gather Act 114 of 1937 into the fold, but still the "Statement of Questions Involved" presented to the Michigan Supreme Court did not pass on it other than to say, "The impairment argument was presented in both the Baker and the Birmingham cases and denied in each decision." (11 N. W. (2d), page 223.)

5. Also in 1937, Act 155 was passed to set up machinery for disposing of the many state owned properties at public auction and for disposition of the proceeds;

6. The State Land Office Board sold the properties under Act 155 of 1937, free and clear of encumbrances including drain liens because the State had received them free and clear under Act 114 of 1937;

7. Appellants now attack the constitutionality of Act 155 of 1937 when it did not deprive them of any rights but gave them their percentage of the proceeds of the sale of delinquent lands;

8. Appellants attempt to attack the constitutionality of Act 114 of 1937 when the question of its constitutionality was neither presented to nor passed on by the Michigan Supreme Court;

9. No question giving this court jurisdiction exists.

The motion to dismiss and/or the motion to affirm sho
be granted.

Respectfully submitted,

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Dated: December 30, 1943.